HARIANTO EFFENDY ZAKARIA & ORS A

v.

MAHKAMAH PERUSAHAAN MALAYSIA & ANOR

HIGH COURT MALAYA, KUALA LUMPUR B
AZIAH ALI J
[JUDICIAL REVIEW NO: R3(1)-25-367-2009]
25 OCTOBER 2010

ADMINISTRATIVE LAW: *Judicial review - Certiorari - Application for an order for certiorari to quash award of Industrial Court - Whether there were errors of law in Industrial Court's finding - Whether breach of natural justice sufficient proof of victimization - Whether charge against applicants proven - Whether applicants' dismissal harsh and disproportionate* C D

LABOUR LAW: *Industrial Court - Dispute over wrongful dismissal - Whether there was error of law in Industrial Court's finding - Whether High Court should weigh and assess evidence - Whether applicants' dismissal harsh and disproportionate* E

The applicants, who were employees of the 2nd respondent and members of the National Union of Bank Employees ('NUBE'), were found guilty by a domestic inquiry for participating in an unlawful picketing within the premises of the 2nd respondent. They were then terminated from their employment. The Industrial Court found that the domestic inquiry was defective due to breach of natural justice and proceeded to hear the case *de novo*. The Industrial Court, having reviewed the evidence *inter alia* the CCTV recordings related to the charges, ordered the reinstatement of the 4th applicant and upheld the dismissal of the 8th applicant. The applicants contended that the decision was illogical as the facts surrounding the 4th and 8th applicant were the same. The applicants then applied for judicial review for an order of *certiorari* to quash the decision of the Industrial Court. The issues to be determined were (i) whether the Industrial Court's finding of breach of natural justice was proof of victimization; (ii) whether the charge against the applicants was proven; and (iii) whether the punishment of dismissal was too harsh and disproportionate to the misconduct. F G H I

Held (dismissing the application):

(1) The applicants claimed that the breach of natural justice and the defective domestic inquiry were clear indication of victimization. The onus was on them to produce positive proof that their suspension and dismissal amounted to victimization. The breach of natural justice in the conduct of the domestic inquiry or the fact that the applicants were members of NUBE, on its own, was not sufficient proof of victimization or unfair labour practice. (para 18)

(2) The Industrial Court made findings of fact in respect of each applicant upon viewing the CCTV recordings. It was not the function of the High Court to weigh such evidence and assess the credibility of the witnesses. The Industrial Court did not commit any error of law in its findings, in respect of the applicants' misconduct. (paras 22 & 27)

(3) The Industrial Court made the award after taking into account the misconduct and also the nature of the industry *ie*, the banking industry. It was of the view that the punishment of dismissal was appropriate in the circumstances. Each employer reacts differently to an employee's misconduct, the High Court should not substitute its own views on the appropriateness of the punishment. (para 30)

Case(s) referred to:

Abd Jalil Rahmat v. Hj Aman Shah Hj Abdul Rashid & Ors [2008] 5 CLJ 537 CA ***(refd)***

Airspace Management Services Sdn Bhd v. Col (B) Harbans Singh Chingar Singh [2000] 4 CLJ 77 CA ***(refd)***

Malayan Banking Bhd v. Association of Bank Officers Peninsular Malaysia & Industrial Court [1988] 1 CLJ 276; [1988] 1 CLJ (Rep) 183) SC ***(refd)***

Menara Panglobal Sdn Bhd v. Arokianathan Sivapiragasam [2006] 2 CLJ 501 CA ***(refd)***

NC Watling & Co Ltd v. Richardson [1978] ICR 1049 ***(refd)***

Ng Hock Cheng v. Pengarah Am Penjara & Ors [1998] 1 CLJ 405 FC ***(refd)***

Ngeow Voon Yean v. Sungei Wang Plaza Sdn Bhd & Anor [2004] 1 CLJ 8 CA ***(refd)***

Non-Metallic Mineral Products Manufacturing Employees Union v. South East Asia Fire Bricks Sdn Bhd [1976] 1 LNS 85 ***(refd)***

Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd [2010] 8 CLJ 629 FC ***(refd)***

Rolls-Royce Ltd v. Walpole [1980] IRLR 343 ***(refd)***

Said Dharmalingam Abdullah v. Malayan Breweries (Malaya) Sdn Bhd [1997] 1 CLJ 646 SC ***(refd)***

Soon Seng Cement Products Sdn Bhd & Anor v. Non-Metallic Mineral Products Manufacturing Employees' Union & Anor [1998] 1 LNS 508 HC ***(refd)***

Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 1 MLJ 261; [1996] 2 CLJ 771 CA ***(refd)***

William Jacks & Co (M) Sdn Bhd v. S Balasingam [1997] 3 CLJ 235 CA ***(refd)***

Wong Yuen Hock v. Syarikat Hong Leong Assurance Sdn Bhd & Another Appeal [1995] 3 CLJ 344 FC ***(refd)***

Legislation referred to:
Industrial Relations Act 1967, s. 20(1)
Rules of the High Court 1980, O. 53

For the applicants - Anand Ponnudurai (Alex De Silva with him); M/s Bodipalar Ponnudurai De Silva
For the 2nd respondent - Dato' T Thavalingam; M/s Zaid Ibrahim & Co

Reported by Melinda Robert

JUDGMENT

Aziah Ali J:

[1] The applicants apply for judicial review under O. 53 of the Rules of the High Court 1980 for an order of *certiorari* to quash the award of the Industrial Court No. 1266 of 2009 which concluded that the 2nd respondent has shown on a balance of probabilities that the dismissal of the applicants by the 2nd respondent was for just cause or excuse. The applicants contend that the Industrial Court had committed several errors in law and/or fact and/or acted in excess of/without jurisdiction. It is contended that the Industrial Court had come to a decision that is so perverse and devoid of plausible justification that no reasonable body or persons or tribunal in similar circumstances could have reached. It is further contended that the Industrial Court had failed to consider relevant matters and took into consideration irrelevant matters and that the Industrial Court had misapplied or misstated the principles of general law of unlawful dismissal.

[2] In considering this application I am mindful of the approach that this court ought to take and I can do no better than to refer to the judgment of Mohd Ghazali Yusoff JCA (as His Lordship

A then was) in the case of *Menara Panglobal Sdn Bhd v. Arokianathan Sivapiragasam* [2006] 2 CLJ 501 in which His Lordship has succinctly laid out the principles of judicial review as follows:

> I would think that in dealing with judicial review a judge should have the following principles, *inter alia*, in the forefront of his mind:
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> (i) judicial review is not an appeal from a decision but a review of the manner in which the decision was made;
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> (ii) the High Court is not entitled on an application for judicial review to consider whether the decision itself, on the merits of the facts, was fair and reasonable;
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> (iii) the High Court, through judicial review, should not introduce technicalities of the court of law to the Industrial Court; this would certainly be so as s. 30(5) of the Act imposes a duty upon the Industrial Court to have regard to substantial merits of a case rather than to technicalities and it also requires the Industrial Court to decide a case in accordance with equity and good conscience;
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> (iv) the main and only function of the Industrial Court in dealing with a reference under s. 20 of the Act is to determine whether the misconduct or irregularities complained of by the management as to the grounds of dismissal were in fact committed by the workman and if so, whether such grounds constitute just cause or excuse for the dismissal;
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> (v) the Industrial Court should not be burdened with the technicalities regarding standard of proof, the rules of evidence and procedure that are applied in the court of law;
>
> (vi) the High Court will not interfere with finding of facts by the Industrial Court unless the same are completely unsupported by evidence and further, will not interfere merely because it may come to different conclusions on facts on the basis of the same evidence; weighing and assessing the evidence of the witnesses is the function of the Industrial Court and not that of the High Court.

In the case of *Abd Jalil Rahmat v. Hj Aman Shah Hj Abdul Rashid & Ors* [2008] 5 CLJ 537 the Court of Appeal said:

> It cannot be overly emphasised that in a case of this nature, where an aggrieved person seeks a judicial review, he must take cognisance of certain perimeters, namely the limited jurisdiction of a court to disturb the decision of an inquiry, and the evidential burden which the appellant cannot escape from. A court is only

> interested in the decision making process. It is not the court's duty to consider whether the decision is fair and reasonable, but merely to scrutinise the process leading to that decision. Its own view takes a back seat and may not substitute the decision as regards the appropriate penalty for the appellant's misconduct.

Following the abovementioned authorities and having considered the evidence, the written submissions and the Award I dismissed the application. Each applicant was ordered to pay RM500 costs to the 2nd respondent.

Background

[3] The 2nd respondent is now known as 'CIMB Bank'. At the material time all the applicants were confirmed employees of the 2nd respondent and active members of the National Union of Bank Employees ("NUBE"). On 9 October 2003, 13 October 2003, 14 October 2003, 20 October 2003 and 21 October 2003 NUBE conducted pickets outside the 2nd respondent's premises at Bangunan BCB, Jalan Tun Perak, Kuala Lumpur ("the Premises") in relation to a trade dispute between NUBE and the 2nd respondent. There were other pickets staged by NUBE at other branches of the 2nd respondent. During the picket, bullhorns, air horns, whistles, banners and placards were used.

[4] On 21 October 2003 at about 12.30pm the applicants and others arrived at the premises to commence picketing. The main entrance to the premises was closed to prevent the picketers from disturbing the 2nd respondent's customers as the previous day two unknown picketers had stood by the entrance door and created a nuisance by blowing whistles and air horns. Customers were directed to use a side door. Guards were stationed at the side door to prevent picketers from creating a nuisance.

[5] According to the 2nd respondent, at approximately 1.25pm the picketers holding placards and balloons moved from the front of the premises and proceeded towards the side entrance and despite attempts by the security personnel, barged through the side door and proceeded to the lobby of the 2nd respondent's Jalan Tun Perak branch. The picketers entered the banking hall.

[6] The 2nd respondent said it had reason to believe that the applicants were among those who entered the premises and participated in an unlawful picket within its premises. The 2nd respondent contends that the applicants as employees had conducted themselves in a manner that had led to the disruption

of its business and operations. It had also caused disrepute to the 2nd respondent's image as a premier financial institution in the country.

[7] The applicants claim that they and some NUBE members were returning after lunch and the picket. The applicants were at the forefront of the group. They approached the side entrance to return to their work stations when the security guards pushed them away. It is claimed that the actions of the security guards caused them to disperse in confusion as to why they were locked out. Some of the 2nd respondent's customers were also locked out as well. NUBE officials then made sure that the applicants and their members were permitted to return to their work stations. The applicants denied participating in any picket within the 2nd respondent's premises.

[8] By various letters the 2nd respondent suspended 15 employees including the applicants from work pending investigation. Thereafter the 2nd respondent issued show cause letters to the applicants and the other employees which read *inter alia* as follows:

> It has come to our attention that you had:
>
> > On 21st October 2003 at or around 1.29 pm to 1.34 pm., together with a few others entered into the premises of BCB Jalan Tun Perak/BCB Head Office and participated in an unlawful picket therein.
>
> Your above act tantamount to conduct that is not conducive to our business environment and the same has brought the Bank into disrepute among customers and other employees.

[9] NUBE sent a letter dated 21 November 2003 to the 2nd respondent purporting to reply on behalf of the employees who were issued with the show cause letters. The letter from NUBE was signed by J Solomon, General Secretary of NUBE and the 5th applicant herein. He is also the deponent of the applicants' affidavit in support on behalf of all the other applicants. The 2nd respondent requested the employees to submit individual letters of explanation to the show cause letters issued to them. All the applicants gave a standard reply to the show cause letters to the effect that their replies were as contained in NUBE's letter of 21 November 2003. For ease of reference the contents of NUBE's letter is reproduced as follows:

We refer to your surprising "show cause" letters dated 18.11.2003 and 21.11.2003, purporting to require some of our members to "show cause" over the matter of the picket on 21.10.2003.

From the words used in the first three (3) paragraphs of your letter it is clear that you have **concluded** that our members including the undersigned are guilty of the allegations in your letter. Your letter is therefore a window dressing to give a semblance of fairness. It is distasteful especially since this Union's attempt to comply with your request made through MCBA, Executive Director, Mr. S. Sivagnanam to write an amiable note on a private and confidential basis in order to resolve the matter amicably was rejected unceremoniously despite the undersigned adopting the draft given by Mr. S. Sivagnanam. This was followed by your above-mentioned "show cause" letters.

We now place on record that your action in sending the "suspension from work" letters dated 28.10.2003, 10.11.2003 and 13.11.2003 to some of our members followed by the above-mentioned "show cause" letters is in breach of the following:

a) Relevant provisions of the current MCBA/NUBE Collective Agreement.

b) Section 5(1) of the Industrial Relations Act 1967.

c) Section 59(d) and (e) of the Industrial Relations Act 1967 - (which is a criminal offence).

We hereby place on record that the picket at the Bank premises on 21.10.2003 was in compliance with the proviso to Section 40(1) of the Industrial Relations Act 1967. We suggest you read the section carefully before you make illegal conclusions.

We will be lodging a police report on the offence you have committed as mentioned in paragraph 3(c) above.

If you persist in your unlawful action we can assure you of an appropriate retaliation by legal industrial action. We hope good sense will prevail in the interest of industrial harmony in the banking sector.

Please treat this letter as the reply from our relevant members, whose names appear in the list attached a reply to your "show cause" letters. All of them including the undersigned hereby deny the allegations contained in your "show cause" letters.

Thank you.

Yours faithfully,

Sgd.

J SOLOMON
GENERAL SECRETARY

C.C. 1. Relevant members (as per list attached)

2. Mr. S. Sivagnanam – In view of your role in the matter referred to in the 2nd paragraph above, if this matter does not end with this letter, this Union shall have no more confidence in you as Executive Director of MCBA and therefore, we will not entertain any further communication from you in that capacity.

3. The EXCO of MCBA

4. President

5. Hon. Treasurer

[10] By letters dated 24 December 2003 the 2nd respondent issued letters of a domestic inquiry. In the letter the charge levelled against the applicants reads *inter alia* as follows:

On 21st October 2003 there was a picket outside Bangunan BCB Jalan Tun Perak.

It is alleged that you had, as an employee of the Bank, on 21st October 2003 between 1.29 p.m. and 1.34 p.m. entered into the premises of Bangunan BCB Jalan Tun Perak and participated in an unlawful picket within the premises. You had further conducted yourself in a manner that has led to the disruption to the Bank's business and operations and the same has caused disrepute to the Bank's image.

You are hereby required to be present personally before the Inquiry Panel on **Monday, 12th January 2004, at 10:00 a.m. at 8th Floor Manila Room, BCB Jalan Tun Perak.**

At this inquiry, you shall have the opportunity to be heard and to explain your act of misconduct. You shall also have the right to bring your witness(es), if any.

[11] The domestic inquiry was duly convened at which all the applicants pleaded not guilty. The applicants who were found guilty by the domestic inquiry panel were requested to submit a written plea in mitigation before punishments were imposed. The applicants submitted their letters of mitigation and also referred to a letter from the Office of the Prime Minister seeking the 2nd respondent's consideration over the disciplinary action taken against the applicants.

[12] By letters dated 27 April 2004 the 2nd respondent terminated the applicants' employment and another employee with immediate effect. Five other employees who were earlier suspended were reinstated. One employee was imposed with stoppage of increment for two years and another suspended employee reported back for work without being asked to attend a domestic inquiry.

[13] Pursuant to representations made by the applicants under s. 20(1) of the Industrial Relations Act 1967 ("the Act") the Minister referred the representations to the Industrial Court for adjudication.

[14] The applicants relied on the following grounds in support of their application:

(a) breach of natural justice and flawed domestic inquiry

(b) whether the charge was proven

(c) whether the punishment of dismissal was too harsh and whether there was discriminative practice

It was agreed that the decision of this court would be based on the written submissions.

Breach Of Natural Justice And Flawed Domestic Inquiry

[15] In the award the Industrial Court found that the inquiry was unfair because the applicants were denied documents they had requested for and their request for seven days to prepare their submissions were denied by the 2nd respondent. Therefore the Industrial Court found that the domestic inquiry was defective due to breach of natural justice and rejected the decision of the inquiry panel. The Industrial Court proceeded to hear the case *de novo*. Counsel for the 2nd respondent submits that a defective domestic inquiry or the absence of one is not fatal to a dismissal as the proceedings before the Industrial Court was *de novo* (*Ngeow*

A *Voon Yean v. Sungei Wang Plaza Sdn Bhd & Anor* [2004] 1 CLJ 8). The purported flawed domestic inquiry did not play a pivotal role in determining the legality of the dismissal by the 2nd respondent (*Wong Yuen Hock v. Syarikat Hong Leong Assurance Sdn Bhd & Another Appeal* [1995] 3 CLJ 344). It is submitted that the B Industrial Court had acted in accordance with the rules of natural justice and procedural fairness in hearing the matter *de novo*.

[16] The issue of a defective domestic inquiry has been considered in the case of *Wong Yuen Hock v. Syarikat Hong Leong* C *Assurance Sdn Bhd & Another Appeal (supra)* referred to by counsel for the 2nd respondent. In that case the Federal Court said *inter alia:*

> … the Industrial Court should be capable of curing any procedural defect in natural justice at the management stage of the dismissal D dispute.
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> … once a case of wrongful dismissal had been properly referred by the Minister under s. 20(3), the Industrial Court was seised with jurisdiction and was obliged under the Act to determine the dispute on its merits. Thus, even where there was a breach of E contractual or statutory obligation to hold an inquiry, the Industrial Court should proceed to determine on the merits firstly, whether the misconduct complained of was in fact committed by the employee, and secondly whether the nature and extent of the misconduct could constitute just cause or excuse for the dismissal.
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> F
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> Invariably, the hearing before the Industrial Court itself which indeed provides a better and impartial forum for the employee than most domestic tribunals, should be taken as sufficient opportunity for the employee to being heard to satisfy natural justice and thereby rectify any omission to hold any domestic G inquiry. Indeed, the Minister's reference should be viewed as a hearing de novo by an independent statutory tribunal.

[17] In this case having found that the domestic inquiry was defective, the Industrial Court had correctly decided to hear the H case *de novo*. This would therefore rectify any purported defect in the domestic inquiry as the applicants would be accorded with sufficient opportunity to be heard. However counsel for the applicants submits that notwithstanding that the Industrial Court is entitled to proceed with the hearing *de novo*, the Industrial I Court ought to have held that the breaches of natural justice and the defective inquiry were clear indication of victimization by the 2nd respondent. It is further submitted that the decision of the 2nd respondent to dismiss the applicants who were active and

strong supporters of the Union and not others was clearly unfair labour practice and victimization. Counsel submits that had the Industrial Court addressed its mind to this issue, it would have concluded that the dismissal of the applicants was actuated by bad faith with a sole purpose of getting rid of active unionists.

[18] Where a claim of victimization is made, the onus is on the party alleging it to produce positive proof (*Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd* [2010] 8 CLJ 629). I find no such proof adduced by the applicants that their suspension and dismissal by the 2nd respondent amounted to victimization for their trade union activities. To my mind breach of natural justice in the conduct of the domestic inquiry or the fact that the applicants were NUBE members without more would not be sufficient to prove victimization or unfair labour practice.

Whether The Charge Was Proven

[19] Before the Industrial Court CCTV recordings of events related to the charges were tendered as exhibits and copies were extended to the solicitors for the applicants. The CCTV recordings showed that some of the applicants were holding placards and balloons. Counsel for the applicant submits that the applicants were merely walking back into the premises to hand over their placards to the union officials and then return to their work stations and they had to use the side entrance as the main entrance was locked.

[20] Counsel submits that it defies logic that the Industrial Court would order the reinstatement of the 4th applicant but upheld the dismissal of the 8th applicant. It is submitted that with regard to the 4th and 8th applicants the facts surrounding the 4th and 8th applicants were the same. It is further submitted that some of the union members were only there to ensure that the picketers proceeded back to their work stations after the picketing had ended outside the premises. They were not even holding any placards or banners. Counsel submits that having accepted the evidence of the 4th applicant, the Industrial Court ought to have also accepted the evidence of the other applicants. Counsel further submits that the Industrial Court ought to have given sufficient consideration to the fact that the picket had commenced for several days and were never done in the 2nd respondent's premises. It is submitted that their past conduct would have indicated that there was no intention to picket inside the premises and the Industrial Court ought to have accepted the evidence of

the applicants that they had to use the side entrance because the main door was locked. It is further submitted that there was no evidence of disruption of the 2nd respondent's business and operations.

[21] For the 2nd respondent it is submitted that copies of the seven CCTV recordings were extended to the solicitors for the applicants for purposes of cross-examination. The applicants were therefore duly accorded the opportunity to cross-examination as the matter was heard *de novo*. The Industrial Court had reviewed the seven CCTV recordings tendered as exhibits. The Industrial Court came to findings of fact based on the CCTV recordings.

[22] In the award the Industrial Court made findings of fact in respect of each applicant upon viewing the CCTV recordings. In respect of the 4th applicant, the Industrial Court considered the fact that he was found not guilty in the domestic inquiry even though he was seen with the 8th applicant holding placards as the domestic inquiry accepted the 4th applicant's explanation that he gave the placard to the union official at side entrance before going back to his work station. Despite the decision of the domestic inquiry, the 2nd respondent found him guilty. The Industrial Court found no reason to differ with the decision of the domestic inquiry. Therefore the Industrial Court found that the dismissal of the 4th applicant was without just cause or excuse and ordered his reinstatement. In respect of the 8th applicant, the award shows that the 8th applicant agreed that he brought the placard into the lobby and to the banking hall. From the CCTV recording the Industrial Court found that the 8th Applicant raised the placard so that it could be seen. In the award the Industrial Court stated as follows:

> YM 8
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> Bersetuju membawa placard masuk ke lobi dan terus ke Banking Hall. Semasa di lobi kelihatan mengangkat placard seolah-olah mahu orang melihatnya.

Thus in respect of the 8th applicant the finding of the Industrial Court was made based on its observations on what was shown in the recording. In the award the Industrial Court had explained why it ordered reinstatement of the 4th applicant but upheld the dismissal of the 8th applicant as being with just cause or excuse. I do not find any unreasonableness in these findings. It cannot be said that there was insufficient or no evidence to support the findings.

[23] Counsel for the applicants further submits that the Industrial Court merely made an assumption of disruption of business. It is further submitted that there was absolutely no evidence that the actions of the applicants had caused disrepute to the 2nd respondent's image. Counsel submits that the CCTV recordings clearly showed that the picket did not disrupt the 2nd respondent's business. Therefore it is submitted that the assumption of disruption of business was perverse in light of the Industrial Court's own findings that the 2nd respondent's customers were carrying on business with the bank at the material time. It is submitted that as there was absolutely no evidence led as to the manner and how the actions of the applicants had caused disrepute to the 2nd respondent's image and therefore the charge against the applicants were not proven and the award ought to be quashed.

[24] For the 2nd respondent counsel submits that the bank was open and there were customers at the material time. The 2nd respondent is involved in the banking industry and the involvement of the applicants in the illegal picket within its premises had caused disrepute to the 2nd respondent's business. Therefore it is submitted that the decision of the Industrial Court is not perverse.

[25] In a petition for *certiorari* the court has to take the evidence as it stand and not go into the question of its reliability (see *MP Jain's Administrative Law of Malaysia and Singapore* (3rd edn). This has been reiterated in numerous judgments of the superior courts. In *Non-Metallic Mineral Products Manufacturing Employees Union v. South East Asia Fire Bricks Sdn Bhd* [1976] 1 LNS 85 Raja Azlan Shah FJ (as His Majesty then was) said:

> The circumstances under which the High Court can interfere with the decision of the Industrial Court are limited. For instance, it has no jurisdiction under s. 25 of the Courts of Judicature Act to interfere with the findings of fact reached by the Industrial Court on the ground that the decision is erroneous except where there is a clear error of law on the face of the record.
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> It cannot arrogate the powers of a Court of Appeal by substituting its own judgment for that of the Industrial Court on question of fact and cannot review the evidence.

In *Airspace Management Services Sdn Bhd v. Col (B) Harbans Singh Chingar Singh* [2000] 4 CLJ 77 the court said:

A where the Industrial Court has accepted or rejected the evidence of a particular witness and gone on to make a finding based on such acceptance or rejection, the High Court is bound to accept such finding.

B In *Menara Panglobal Sdn Bhd v. Arokianathan Sivapiragasam (supra)* Mohd Ghazali Yusof JCA said:

... the learned Chairman heard the facts, had seen the witnesses and had drawn his own conclusions from what was presented before him. Surely these are matters for the Industrial Court and not for the High Court to determine.

C

[26] Following the abovementioned authorities, it is therefore not the function of this court to review, reassess, reappreciate, reappraise evidence, or draw its own inferences as to facts from the evidence. The court generally is not inclined to interfere with

D findings of fact made by the Industrial Court where such findings are based on credibility of witnesses unless it is shown that such finding is "... perverse and so devoid of plausible justification that no reasonable body of persons could have reached it ..." (per Abdolcader SCJ in *Malayan Banking Bhd v. Association of Bank*

E *Officers Peninsular Malaysia & Industrial Court* [1988] 1 CLJ 276; [1988] 1 CLJ (Rep) 183). If there is some evidence to support a finding of fact it is not this court's function to interfere with the findings merely because of insufficiency or inadequacy of evidence.

F **[27]** I find that the applicants are essentially challenging the findings of the Industrial Court made in respect of each applicant based on its observations and assessment of the evidence tendered and the testimony of witnesses. The credibility and reliability of a witness are matters for the Industrial Court (*Soon*

G *Seng Cement Products Sdn Bhd & Anor v. Non-Metallic Mineral Products Manufacturing Employees' Union & Anor* [1998] 1 LNS 508). It is the function of the Industrial Court and not that of the High Court to weigh the evidence produced and assess the credibility of the witnesses. Having perused the award I find that

H the Industrial Court has not committed any error of law in its findings in respect of the applicants' misconduct.

Whether The Punishment Of Dismissal Was Too Harsh And Whether There Was Discriminative Practice

I **[28]** For the applicants it is submitted that the punishment is too harsh and disproportionate to the alleged misconduct. The applicants contend that the 2nd respondent was guilty of unequal

treatment and practiced double standard as one of those charged (4th applicant) was found not guilty. One employee, Rohana binti Abdul Samad was not called to attend the domestic inquiry but was asked to report back to work. For the 2nd respondent it is submitted that this court ought not to substitute its view as to what would be the appropriate punishment/penalty to be imposed. Counsel cited the minority judgment of NH Chan JCA in the case of *Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261; [1996] 2 CLJ 771.

[29] In *Tan Tek Seng* NH Chan JCA adopted the words of Philips J in the case of *N.C. Watling & Co. Ltd. v. Richardson* [1978] ICR 1049 at pp. 1056, 1057. His Lordship NH Chan said as follows:

> It is not for this Court on an appeal, nor for any other Court on the original hearing, to decide whether it would have dismissed on those facts. I think the correct test for this Court on an appeal or for the High Court on the original hearing is to determine whether it was reasonable for the appellant's employers to dismiss him on those facts. I gratefully adopt the words of Phillips J in *N. C. Watling & Co. Ltd. v. Richardson* [1978] ICR 1049 at pp. 1056, 1057:
>
> ... the industrial tribunal, while using its own collective wisdom is to apply the standard of the reasonable employer; that is to say, the *fairness or unfairness of the dismissal is to be judged not by the hunch of the particular tribunal, which (though rarely) may be whimsical or eccentric, but by the objective standard of the way in which a reasonable employer in those circumstances, in that line of business, would have behaved.*
>
> It has to be recognised that there are circumstances where more than one course of action may be reasonable. (emphasis added)

His Lordship NH Chan then referred to the case of *Rolls-Royce Ltd. v. Walpole* [1980] IRLR 343 which applied the principle stated in *Watling*'s case as follows:

> As this appeal tribunal pointed out in the judgment in *Watling*'s case, in a given set of circumstances it is possible for two perfectly reasonable employers to take different courses of action in relation to an employee.
>
> Frequently there is a range of responses to the conduct or capacity of an employee on the part of an employer, from and including summary dismissal downwards to a mere informal warning, which can be said to have been reasonable.

A *It is precisely because this range of possible reasonable responses does exist in many cases that it has been laid down that it is neither for us on an appeal, nor for an industrial tribunal on the original hearing, to substitute our or its respective views for those of the particular employer concerned.* (emphasis added)

B The minority judgment of NH Chan JCA was affirmed by the Federal Court in *Ng Hock Cheng v. Pengarah Am Penjara & Ors* [1998] 1 MLJ 153; [1998] 1 CLJ 405 where in his judgment Peh Swee Chin FCJ said as follows:

C Just like a professional body being the best tribunal to judge the seriousness of misconduct of its members, in a similar vein, *an employer, including a government is the best person to judge similarly the seriousness of misconduct of an employee.*

Thus, we are of the opinion that on the narrow point in question,
D the majority judgment in *Tan Tek Seng (supra)* [1996] 2 CLJ 771 cannot stand though we express our agreement with the minority judgment on the same narrow point.

We once again revert to the instant appeal. Likewise *we did not*
E *interfere with the order of dismissal despite what were said to be mitigating circumstances.* (emphasis added)

Similarly in the case of *Said Dharmalingam Abdullah v. Malayan Breweries (Malaya) Sdn Bhd* [1997] 1 CLJ 646 the Supreme Court reiterated that punishment is for an employer to decide having
F considered the circumstances of the case. The Supreme Court said:

We are prepared to accept, as a tenable proposition that, speaking generally, where misconduct has been proven, different employers might react differently. To quote Acker LJ in *British Leyland UK*
G *Ltd v. Swift* [1981] IRLR 91, 93. An employer might reasonably take the view, if circumstances so justified, that his attitude must be a firm and definite one and must involve dismissal in order to deter other employees from like conduct. Another employer might quite reasonably on compassionate grounds treat the case as
H special.

[30] In the award the Industrial Court did take into consideration the misconduct and the fact that the 2nd respondent is in the banking industry. The Industrial Court is of the view that the
I punishment of dismissal is appropriate. I am of the view that there is no error committed by the Industrial Court. The "fairness or unfairness of the dismissal is to be judged … by the objective standard of the way in which a reasonable employer in those

circumstances, in that line of business, would have behaved." (Phillips J in *N. C. Watling & Co. Ltd.*) Bearing in mind the "range of possible reasonable responses" and that the employer is "the best person to judge the seriousness of misconduct of an employee" the court ought not to substitute its own view on the punishment as different employers react differently to an employee's misconduct.

Conclusion

[31] The question at the end of the day is whether a reasonable tribunal similarly circumstanced would have come to a like decision on the facts before it (*William Jacks & Co (M) Sdn Bhd v. S Balasingam* [1997] 3 CLJ 235 CA). Having perused and considered the documents produced, the submissions and the award I find no error of law committed by the Industrial Court. The decision of the Industrial Court is not tainted with the infirmities of illegality, irrationality or procedural irregularity to merit curial intervention. For the above stated reasons the application is dismissed. Costs of RM500 to be paid by each applicant to the 2nd respondent.